

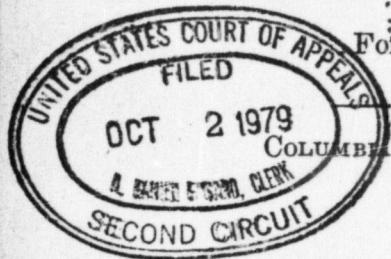
*United States Court of Appeals
for the Second Circuit*



AMICUS BRIEF

75-7600

United States Court of Appeals



FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*

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September 27, 1979



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National Broadcasting Company, Inc. ("NBC") respectfully submits this brief, *amicus curiae*, in order to advise the Court as to its interest in and position with respect to the issue presented on this appeal.

Interest of the *Amicus Curiae*

The NBC Television Network is one of the nationwide television networks licensed by ASCAP and BMI and is presently paying the two licensing societies combined millions of dollars per year for blanket licenses to perform musical compositions in their respective repertoires. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws

to ASCAP and BMI as well as the construction of the consent decrees in *United States v. ASCAP* and *United States v. BMI*.

Argument

Although NBC has not sought the kind of relief sought by its competitor, CBS, it too has had its differences with ASCAP and BMI over the years concerning the societies' insistence upon what Mr. Justice Stevens described in his dissent as the "blanket all or nothing license".* Such a license, to quote Mr. Justice Stevens, "requires users to buy more music than they want at a price which . . . may well be far higher than what they would choose to spend for music in a competitive system" (99 S.Ct. 1551, 1568). This observation is particularly true in the case of present day network television broadcasting where the lack of competition for music rights presents a unique anomaly.

In every other element of network television programming, price is determined by competitive forces—by one network bidding against the others for programs and by the various program suppliers competing with one another in offering their programs to the networks. Only when it comes to the right to publicly perform copyrighted music is a program element carved out and put beyond competitive forces.

While such a result may be a practical necessity with respect to certain music users, it does not follow that all music must be excluded from the competitive arena in the

* As this Court recognized in its prior opinion, the per program license provided for in the ASCAP consent decree "is simply another form of blanket license" whose utility is limited to broadcasters whose schedule consists predominantly of non-musical programming. 562 F.2d at 133-34.

realm of present day network television. The major portion of the music used on network television today is controlled by a mere handful of parent companies (by and large the established motion picture producers) which have both an ASCAP and BMI publishing subsidiary. These "publishers" perform few, if any, of the traditional functions of a music publisher and exist mainly as a vehicle to qualify for the receipt of ASCAP and BMI royalties. In terms of gross revenues, it is the parents of those "publishers" which are the principal beneficiaries of the historic ASCAP-BMI blanket licensing system.

When one of the entertainment companies, generally known as "packagers" in the broadcasting business, creates a television program for sale to a network,* it normally employs writers to compose the thematic and background music, which in most instances constitutes the only music used on the program.** The packager has "shop rights" to the copyrights used in the same way as a manufacturer obtains "shop rights" to patents resulting from any invention made by his employees during the course of their employment. Thus, a packager could easily sell a complete package directly to the purchaser, not a package which cannot be shown on the air absent a blanket license from ASCAP and/or BMI. The packager's retention of music performance rights, its assignment of these to a "publisher" subsidiary, and its participation in the receipts of the copyright pools serves no economic need. The various con-

* Virtually all of the entertainment programs shown on the NBC Television Network are produced and owned by independent outside packagers. This season, for example, NBC only produces one regularly-scheduled entertainment program — the one-hour weekly series, "Little House on the Prairie".

** In recent years, most of the entertainment programs shown on network television have not made use of music as a feature but rather for background or thematic purposes. Such music is usually written for the particular program.

siderations advanced to justify indirect, non-competitive licensing through music societies, such as the need for a common agency to police the use of copyrighted compositions and the difficulties in locating a widely dispersed body of composers, are totally absent in this kind of situation. The only thing accomplished is the elimination of competitive pricing for this one program element. Since virtually all of NBC's entertainment programs are acquired from outside purchasers, the anti-competitive impact of ASCAP's and BMI's practices is even more pronounced.

Early in 1970, NBC attempted to procure from ASCAP, under the consent decree in *United States v. ASCAP*, a so-called nucleus license rather than a blanket license on the millions of compositions in the ASCAP repertory. Thus, NBC requested a license limited to some 2,200 compositions and certain background music libraries contained in the ASCAP repertory which its studies showed were used with frequency on the NBC Television Network, or which were contained in programs NBC had "in the can". A comparable request was made of BMI. Such licenses would have permitted NBC to initiate direct licensing with packagers and other large-scale suppliers of music, thus satisfying a major portion of its music requirements through direct negotiations with the copyright owner.

ASCAP vigorously opposed NBC's request, contending that NBC was required to take a blanket license or nothing. A similar position was taken by BMI. NBC then applied to the District Court under the consent decree asking that ASCAP be directed to offer the limited license requested. However, the District Court held in favor of ASCAP, holding that the decree did not require ASCAP to grant a license on anything less than its entire repertory. *United States v. ASCAP (Application of National Broad-*

casting Co.) CCH 1971 Trade Cases ¶ 73,491 (S.D.N.Y. 1970).

NBC then appealed to this Court (Docket No. 71-1487). The United States, in its capacity as plaintiff in the action, filed a brief urging reversal of the District Court's decision on the grounds that:

"NBC . . . wants to begin dealing directly. ASCAP's refusal to cooperate is . . . not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)."

At this point, before its answering brief was due, ASCAP initiated settlement discussions with NBC which resulted in NBC's taking a blanket license from ASCAP in return for specified amounts. Subsequently, NBC also entered into a blanket license with BMI. In stipulating to dismissal of its appeal as moot, which was "so ordered" by this Court on December 21, 1971, ASCAP expressly waived any *res judicata* or collateral estoppel effect with respect to the District Court's order and it was provided that the dismissal of the appeal was "without prejudice to any position that any party may take in any future proceeding" under the consent decree.*

While the opinion of the Supreme Court here rejected the argument advanced by the United States in 1971 in the appeal of the NBC application, i.e., that ASCAP's refusal to grant anything other than a blanket license gives rise to a *per se* antitrust violation, there is no suggestion in the opinion that the effect is not what the United States

* NBC's licenses with ASCAP and BMI expired on September 30, 1976. Since that date, NBC has operated under interim licensing arrangements subject to retroactive adjustment.

asserted it to be in its brief to this Court, *i.e.*, one of "maintaining prices". Such an effect, we respectfully submit, is clearly unreasonable in a situation where there is no necessity or justification for it, *i.e.*, in the case of network television broadcasting.

As Mr. Justice Stevens concluded:

"The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP.... In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all." (99 S.Ct. at 1569)

The previous opinion rendered by this Court also recognized that the blanket license "reduces price competition among the members and provides a disinclination to compete" (562 F.2d at 140). That opinion—although it did not reach the issue posed by NBC's 1971 appeal under the consent decree, *i.e.*, the question of what kind of license the decree requires—does open up the possibility of a dual licensing structure or other variations, where for example a network could obtain part of its required music licenses from the societies on a per use basis while obtaining the remainder directly from the copyright holder, including program packagers who supply and control the music contained in the programs they sell. Such a result would foster competition in an area where it is presently totally absent.*

* It should be noted that NBC has no interest in seeking damages for the antitrust offenses involved in this suit; its interest is in the creation of competitive conditions.

CONCLUSION

It is respectfully submitted that the decision of the District Court should be reversed and the matter remanded for further proceedings.

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September 27, 1979

Respectfully submitted,

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